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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 827

TAMPA PHOSPHATE RAILROAD COMPANY,
Petitioner,

-vs-

SEABOARD COAST LINE RAILROAD COMPANY
Respondent.

PETITION FOR WRIT OF CERTORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FREE PRESS PUB. CO., INC. - TAMPA

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IN THE

Supreme Court of the United States

October Term, 1969

NO. _____

TAMPA PHOSPHATE RAILROAD COMPANY,
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vs.
SEABOARD COAST LINE RAILROAD COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Tampa Phosphate Railroad Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on October 1, 1969, and its judgment of October 24, 1969, denying rehearing.

OPINIONS BELOW

The opinion of the Court of Appeals and the concurring opinion of Chief Judge Brown are not yet officially reported and neither is the opinion upon denial of rehearing. The matter required to be appended to or to accompany the petition, by Rule 23 1(i) of the Supreme Court Rules, including those opinions, is voluminous and pursuant to the permission of the Rule is separately presented as an Appendix to the Petition. References (A.) are to this Appendix to the Petition which includes a copy of the affidavit filed with the Court of Appeals pursuant to 28 U.S.C. §2108 showing the presence of the jurisdictional amount in one of the state court cases. References (R.) are to the Transcript of Record as certified to this court by the Clerk of the Court of Appeals.

JURISDICTION

The District Court on December 14, 1967 (A. 156) in a suit brought by Seaboard enjoined the prosecution in the Florida courts of three pending actions brought in 1965 by petitioner, Tampa Phosphate Railroad Company (Tampa), to acquire by condemnation under the applicable state statutes (F.S.A. §§ 73.012, 73.021, 73.151, 360.01 and 361.01) (A.7) the right to cross with its proposed track the rights of way and tracks of respondent, Seaboard Coast Line Railroad Company (Seaboard) at four different points of crossing.

One suit covering two crossings was pending in the Circuit Court of Polk County, Florida, and was set for trial on December 18, 1967 (A. 152) on the issue of Tampa's right to condemn, and two separate suits covering one crossing each were pending and at issue in the Circuit Court of Hillsborough County, Florida (Original petitions at R. 345, 473, 498).

The circuit courts in Florida are courts of original general jurisdiction (Florida Const. Art. V, Sections 1 and 6(3)). The injunction specifically mentioned by case numbers the three state court proceedings (A. 158-159). Tampa resisted the injunction on the ground, among others, that it would be in violation of 28 U.S.C.A. § 2283 (§ 2283) (R. 135-138).

The Court of Appeals held that the injunction was contrary to 28 U.S.C.A. § 2283 (§ 2283) unless it fell (A 10), "* * * within one of the exceptions authorized by the statute itself."[1]

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[1]28 U.S.C.A. §22832: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The District Court was of the view that 49 U.S.C.A. § 1(20) (§ 1(20)) conferred upon it exclusive jurisdiction to determine whether interstate commerce was involved (R. 152), and held that the injunction came within the "in aid of its jurisdiction" exception (A. 10, R. 292) and made no mention of 28 U.S.C.A. §§ 2321-2325 (§§ 2321-2325). The Court of Appeals "without assaying the merit of this rationale" (A. 11), upheld the injunction on the ground that it could issue under the "expressly authorized by Act of Congress" exception of § 2283 (A. 11), and found such express authority in § 1(20) (A. 12), assisted by §§ 2321-2325 (A. 25).

During the pendency of the state court actions the Interstate Commerce Commission (Commission) by order dated August 7, 1967 adopted the findings and conclusions of a hearing examiner on matters of fact and law, including among others, that Tampa's proposed construction and operation would be in interstate commerce, and over Tampa's initial and unwavering objections that it was without jurisdiction, the Commission denied Tampa a certificate of convenience and necessity therefor (A. 6, R. 147). The examiner's proposed report and order and the order of the Commission are set out in full in the Appendix (A. 43-146 and 147-150), including the examiner's discussion of the jurisdictional issues (A. 116-121).

Upon the coming down of the Commission's order Tampa abandoned any effort to secure interstate authority (A. 157). Instead, in September of 1967, the following month, it amended its petitions in the state courts to allege among other things that it would operate only in intrastate commerce (R. 406), that it would not be a carrier subject to Part I of the Interstate Commerce Act (Act) and that it would not engage in transportation subject to Part I of the Act (R. 490 and 522).

Each of the state circuit courts had found it had jurisdiction to decide the issue of Tampa's right to condemn (A. 152-155, R. 485, 493, R. 517-519), although in no one of them had the issue been decided, although it was about to be decided in the Polk County action when all state court proceedings were stopped by the District Court's injunction.

Tampa's proposed track of approximately thirty miles was to be built from Port Sutton (see photograph, R. 391) to a point near the center of the phosphate producing territory where it would connect with no one (A. 98 and map, A. 144). For the phosphate producers or the South Pierce Railroad[2] to avail themselves of the transportation offered by Tampa they would have to build, own, and maintain at their expense their own connecting tracks (A. 98). There would be no through routes or joint rates, no connection with any other carrier and no interchange of traffic or equipment (A. 98). The phosphate rock and its products would be the only commodities handled which would move only from the phosphate mining territory to storage and dryers at Port Sutton (A. 5), a movement which was characterized by Tampa as more like that of a conveyor belt than a railroad (A. 98).

If the state courts had been permitted to proceed and had found that the proposed construction and operation would in fact and in law be in intrastate commerce and that Tampa had the power to condemn, and had proceeded with the assessment of damages by a jury,

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[2]Examiner's report (A. 58): "Between Pierce and South Pierce, the railroads operate over the line of the South Pierce Railroad, a 9-10 mile long private line owned by American Agricultural Chemical Division of Continental Oil Company (American)." Also (R. 435-436).

Tampa would thereupon be free to proceed in intrastate commerce only with its proposed construction and operation notwithstanding the order of the Commission, subject only to review by the Florida appellate courts and to review by this Court on certiorari.

There could obviously be no physical construction or operation if Tampa was judicially denied the right to cross the existing railroads but the Court of Appeals found that (A. 12), "* * * an attempt to condemn lands for the purpose of constructing new trackage thereon without first acquiring a certificate from the Interstate Commerce Commission constitutes 'construction' within the meaning of this statute". The statute to which reference was made is 49 U.S.C.A. § 1(20) (§ 1(20)) which provides that any "construction" contrary to 49 U.S.C.A. § 1(18) (§ 1(18)) "may be enjoined by any court of competent jurisdiction."

The Court of Appeals found that the express authority of an Act of Congress for staying the normal course of the state court proceedings because they constituted "construction" in violation of § 1(18) was to be found in § 1(20), not because of the language of § 1(20) which obviously does not reach the situation, but because of "the nature of the interests protected by the statute" (A. 11, 14). Those interests were "paramount federal interests" (A. 15) which were not to be subjected even to the possibility of a decision by a state court adverse to the authority of the Commission.

That step produced a dilemma, however, as there was nothing in § 1(20), the statute found to contain the express authority for the Federal court to stop the state court, that required the Federal court itself to refrain from making its own inquiry into the jurisdic-

tion of the Commission, which is what the District Court here had announced it would do as soon as it could (R. 156-157). If § 1(20) authorized the one judge Federal District Court sitting as a court of general jurisdiction to make that inquiry it was perforce an inquiry triable in the state courts of general jurisdiction, and the injunction was in plain contravention of § 2283.

Upon the expressed views of the one judge Federal District Court that it would proceed to try that issue as a court of general jurisdiction, Tampa moved to dismiss the injunction, which motion was denied (R. 163) and this interlocutory appeal followed under the authority of 28 U.S.C.A. § 1292 (R. 164).

It was not until after oral argument that the Court of Appeals requested briefs from the Department of Justice and the Interstate Commerce Commission, which responded with a joint brief (A. 19, Note 6, 39-40, Note 14). The Government Brief (Gov. Brief) treated the state court actions as attacks upon the order of the Commission, making no distinction between Commission jurisdiction and Commission expertise.

The Government Brief admitted that there was authority that Commission findings of violations of 49 U.S.C.A. § 1(18) (§ 1(18)) could be challenged before a single Federal judge in an action under § 1(20) (Gov. Brief, p. 9) and that there was authority for the institution of a true § 1(20) suit in a state court (Gov. Brief, p. 17) but it suggested to the Court of Appeals that (Gov. Brief, p. 14), "A rule restricting attacks upon Commission 1(18) decisions to three-judge courts is undoubtedly the better view."

The Court of Appeals adopted the "better view" of the Government Brief, which avoided the dilemma. The Court of Appeals held that neither the one judge Federal District Court nor the state courts had jurisdiction, in the sense of power to adjudicate as an original matter, issues decided by the Commission, "including matters relating to its jurisdiction," (A. 25), characterizing the state court proceedings as being "in complete derogation of Federal law," (A. 17), and holding that such matters could be challenged only in the framework of the limited review available in the statutory three judge Federal District Court convened under the Urgent Deficiencies Act, 28 U.S.C.A. §§ 2321-2325 (§§ 2321-2325) (A. 25). Upon that reasoning § 1(20) was found by the Court of Appeals to be the express authority of an Act of Congress for the disregard of § 2283 under the circumstances of this case.

The construction put upon § 1(20) and §§ 2321-2325 is in conflict with the applicable decisions of this Court and calls for the exercise by this Court of its power of supervision. It also raises substantial Federal questions under the Fifth and Tenth Amendments to the Constitution of the United States in that (a) it violates due process by denying Tampa any "day in court", state or Federal, as the three judge court receives no evidence and sits only in review of administrative action, and (b) it deprives the state courts of their inherent power to determine their own jurisdiction in an eminent domain proceeding, a proceeding which is the essence of reserved state power.[3]

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

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[3] The Federal courts may relinquish their jurisdiction to a Federal administrative agency, presumably without let or hindrance, as both the Fifth Circuit and the Fourth Circuit have done in the *Southern Railway* cases (A. 25-28) but for the Federal courts to relinquish to the Federal administrative agency a jurisdiction which is not theirs to surrender (i.e. that of the state courts) is another matter.

QUESTIONS PRESENTED

The fundamental question presented for review is:

1. Was the injunction issued by the one judge Federal District Court staying the eminent domain proceedings in the state courts expressly authorized by Act of Congress?

A negative answer to that question is the end of the matter and requires the vacation of the injunction. The affirmative answer given by the Court of Appeals, however, presents the further questions:

2. Is the construction of §1(20) to be the express authority of an Act of Congress to stay the eminent domain proceedings in the state courts, either (a) a decision of the Court of Appeals in conflict with the applicable decisions of this Court or (b) such a departure from the accepted and usual course of judicial proceedings as to call for the exercise by this Court of its power of supervision?

3. Does the construction of § 1(20) and §§ 2321-2324 as depriving Tampa of the right to have any judicial *trial* on the question of the jurisdiction of the Commission deny Tampa due process of law under the Fifth Amendment to the Contitution of the United States?

4. Does the construction of § 1(20) and §§ 2321-2325 as ousting the state courts of the power to determine their own jurisdiction in eminent domain proceedings invade the reserved powers of the states in violation of the Tenth Amendment to the Constitution of the United States?

An affirmative answer to any one of the latter questions requires the reversal of the judgment of the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Constitution of the United States, Amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. 49 U.S.C.A. § 1(18):

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject

to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in Section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

4. 49 U.S.C.A. § 1(20):

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of

this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

5. 49 U.S.C.A. § 1(22):

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

6. 28 U.S.C.A. § 2283:

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

7. 28 U.S.C.A. §§ 2321-2325:

(§ 2321) The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States.

(§ 2322) All actions specified in section 2321 of this title shall be brought by or against the United States.

(§2323) The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

(§ 2324) The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

(§ 2325) An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

8. F.S.A. 73.012, 73.021, 73.151:

(73.012) Actions in eminent domain shall be governed by the rules of civil procedure and the appellate rules unless otherwise provided by this chapter.

(73.021) Those having the right to exercise the power of eminent domain may file a petition therefor in the circuit court of the county wherein the property lies, which petition shall set forth:

(1) The authority under which and the use for which the property is to be acquired, and that the property is necessary for that use;

(2) A description identifying the property sought to be acquired. The petitioners may join in the same action all properties involved in a planned project whether in the same or different ownership, or whether or not the property is sought for the same use;

(3) The estate or interest in the property which the petitioner intends to acquire;

(4) The names, places of residence, legal disabilities, if any, and interests in the property of all owners, lessees, mortgagees, judgment creditors, and lienholders, so far as ascertainable by diligent search, and all unknown persons having an interest in the property when the petitioner has been unable to ascertain the identity of such persons by diligent

search and inquiry. If any interest in the property, or lien thereon, belongs to the unsettled estate of a decedent, the executor or administrator shall be made a defendant without joining the devisee or heir; if a trust estate, the trustee shall be made a defendant without joining the cestue que trust. The court may appoint an administrator ad litem to represent the estate of a deceased person whose estate is not being administered, and a guardian ad litem for all defendants who are infants or are under other legal disabilities; and for defendants whose names or addresses are unknown. A copy of the order of appointment shall be served on the guardian ad litem at least ten days before trial unless he has entered an appearance;

(5) A statement that the petitioner has surveyed and located its line or area of construction, and intends in good faith to construct the project on or over the described property;

(6) A demand for relief that the property be condemned and taken for the uses and purposes set forth in the petition, and that the interest sought be vested in the petitioner.

(73.151) (1) Whenever land sought to be condemned to the use of a railroad or canal company is in the possession, under any law of this state, of another railroad or canal company which is using the same in the construction or operation of its railroad or canal, the use of no more land than is necessary to furnish to the petitioner a right-of-way one hundred five feet in width across such railroad or canal shall be condemned for such use.

(2) If it shall be necessary for any railroad company organized under any law of this state to use, for the purpose of its road, any lands over which any other railroad company shall have previously acquired the right-of-way for its road, the right

to use such lands may be acquired as in other cases. Such lands shall not be taken in a manner to interfere with the main track of the railroad first established except for crossing, as provided by law.

9. F.S.A. 360.01:

(360.01) Every railroad and canal company shall be empowered:

(1) To cause such examinations and surveys for the proposed railroad or canal to be made as shall be necessary for the selection of the most advantageous route, and for such purposes by its officers, agents and servants to enter upon the lands or water of any person for that purpose.

(2) To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its road or canal, but the real estate received by voluntary grant shall be held and used for purposes of such grant only.

(3) To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its road or canal and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to sell, lease or buy any lands or real estate not necessary for its use.

(4) To lay out its road or canal, not exceeding two hundred feet in width, and to construct the same, and, for the purpose of cuttings and embankments and for obtaining gravel and other material, to take as much land as may be necessary for the proper construction, operation and security of the road or canal, or to cut down any trees that may be in danger of falling on the road or into the canal, making compensation therefor as provided for land taken for the use of the company.

(5) To construct its road or canal across, along or upon or use any stream of water, water-course, street, highway or canal which the route of its road or canal shall intersect or touch, and whenever the track of any railroad or canal shall touch, intersect or cross any road, highway or street, it may be carried over or under such railroad or canal, as may be found most expedient for the public good; and in case any embankment or cut in the construction of any railroad or canal shall make it necessary to change the course of any highway or street, the company may construct such road or canal so as to change the course or direction of any road, highway or street.

(6) To cross, intersect or unite its railroad with any other railroad heretofore or hereafter to be constructed at any point in its route or upon the ground of any other railroad company with the necessary turnouts, sidings and switches and other conveniences in furtherance of the objects of its connections; and every company whose railroad is or shall be hereafter intersected by any new railroad can unite with the owners of such new railroads forming such intersections and connections and grant the facilities aforesaid, and if the two corporations cannot agree upon the amount of compensation to be made therefor and all the points and matters of such crossing and connections, the same shall be ascertained according to the provisions for exercising the right of eminent domain, and no company which shall have obtained the right of way and constructed its road at the point of intersection before the beginning of proceedings for condemnation shall be required to alter the grade or change the location of its road.

(7) To take and convey persons or property over their railroad or canal by the power or force of steam or animals or by any mechanical power, and to receive compensation therefor, and to do all the business incident to railroads or canal business.

(8) To erect and maintain all convenient buildings, wharves, docks, stations, fixtures and machinery for the accommodations and use of their passengers and freight business.

(9) To regulate the time and manner in which passengers and property shall be transported.

(10) To borrow such sums of money at such rates of interest and upon such terms as the company or its board of directors shall authorize or agree upon and may deem necessary or expedient, and to execute one or more trust deeds or mortgages, or both, as the occasion may require, of railroads or canals constructed or in process of construction by said company, for the amounts borrowed or owing by such company, as its board of directors shall deem expedient; and such company may make such provisions in such trust deed or mortgage for transferring their railroad track or canal right of way, depots, grounds, rights, privileges, franchises, immunities, machines, houses, rolling stock, furniture, tools, implements, appendages and appurtenances used in connection with such railroads or canals, in any manner whatsoever then belonging to the said company, or which shall thereafter belong to it, as security for any bonds, debts or sums of money as may be secured by such trust deed or mortgage, as they shall think proper; and in case of sale of any railroad or canal, or any part thereof, constructed or in course of construction by any railroad or canal company, by virtue or any trust deed or of any foreclosure of any mortgage thereon, the parties acquiring title under such, and their associates, successors or assigns, shall have or acquire thereby, and shall exercise and enjoy thereafter the same rights, privileges, grants, franchises, immunities and advantages in or by said trust deed or mortgage enumerated and conveyed, which belonged to and were enjoyed by the company making such deed or

mortgage or contracting such debt, so far as the same relate or appertain to that portion of said road or canal or the line thereof mentioned or described and conveyed by said mortgage or trust deed, and no further, as fully and absolutely in all respects as the corporators, officeholders, shareholders and agents of such company might or could have done, had not such sale or purchase taken place, and such purchasers, their associates, successors or assigns may become incorporated as provided by law.

10. F.S.A. 361.01:

(361.01) The president and directors of any corporation organized for the purpose of constructing, maintaining or operating public works, or their properly authorized agents, may enter upon any lands, public or private, necessary to the business contemplated in the charter, and may appropriate the same, or may take from any land most convenient to their work, any timber, stone, earth or other material which may be necessary for the construction and the keeping in repair of its works and improvements upon making due compensation according to law to private owners.

STATEMENT OF THE CASE

The pebble rock or bone valley area of Central Florida, the present center of which lies approximately 30 miles from the port of Tampa, and is the point to which Tampa proposes to build its track, produces approximately three-quarters of the entire phosphate rock production of the United States (R. 54), with over 17 million tons having been produced from that area in 1964 (R. 57), but the Florida phosphate industry, with over a billion dollars invested in land, plant and equipment in the bone valley[4] is extremely sensitive to foreign competition as approximately one-half of its entire production moves from the bone valley to the port of Tampa (A. 57) from where it is sold in the world markets in increasing competition from large phosphate deposits which have been discovered in Morocco, the Spanish Sahara, and in Russia, Peru and Australia (A. 68-69). In meeting that competition the cost of transportation to the port is vital.[5]

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[4] Admittedly an estimate but see Fortune, June 1, 1968, p. 90 "All that Fertilizer and No Place to Grow," at p. 92:

> "In the past five years U.S. Companies have spent more than $4 billion, much of it borrowed from banks and insurance companies, to build fertilizer mines and plants. * * *

[5] Survey Review Report on Tampa Harbor, Florida, dated September 5, 1969, by the Department of the Army, Jacksonville District, Corps of Engineers, United States Army, pages C-23 and 24:

> "20. Transportation cost has always been an important factor in competition and in many instances the freight comprises a major portion of the total delivered cost. * * *
>
> 23. Competition for export markets is critical. Morocco, the world's largest phosphate exporter, with over 10 million tons a year, is planning to increase production to 18 million tons annually. Large deposits of high-grade phosphate rock in Peru and Australia have attracted much attention recently.

Two railroads were serving the Florida phosphate industry at the commencement of the condemnation proceedings in 1965, which were the Seaboard Air Line Railroad Company (Seaboard Air Line) and the Atlantic Coast Line Railroad Company (Atlantic Coast Line), whose merger into the present respondent Seaboard Coast Line Railroad Company became effective July 1, 1967 (R. 416). Seaboard Air Line, defendant in the Polk County action, made no effort at removal although there appeared to be both diversity and jurisdictional amount.

On or about March 18, 1965 the International Minerals and Chemical Corporation (IMC) opened its new phosphate drying, blending and storage facility on the north finger of Port Sutton (Photograph, R. 391) which at that time was served only by the Atlantic Coast Line. For the movement of phosphate rock to that facility the Atlantic Coast Line promulgated a rate for the rail line transportation only (the railroad having nothing to do with the subsequent drying, storage, or movement into vessel) from IMC origins in the bone valley of 75c a ton based upon an annual volume of not less than 2 million tons, *applicable to intrastate commerce only* (A. 104, R. 197. Item 1450 of Supplement 71-A to Florida Phosphate Rock Tariff 876 A).

(Footnote 5 continued)

Russia is a major producer with very large reserves, capable at any time of upsetting present market conditions. Morocco, Russia, and the Spanish Sahara all have significant freight advantages when shipping to European markets, where a major portion of Florida's exports are sold each year. Japan, Florida's largest customer, increased purchases from Morocco and Tunisia during the first 6 months of 1967 over the same period a year earlier. *The ability to export phosphate rock at the lowest possible cost becomes a major factor in determining if Florida will continue to be one of the primary sources of phosphate for the free world."* (Emphasis supplied)

That rail rate to Port Sutton remained in effect applicable to intrastate traffic only until November 1, 1965, when it was republished as applicable on both interstate and intrastate traffic. (R. 197 and 288).

There is now a difference in the rate for the identical movement to Port Sutton depending upon whether that traffic is classified as interstate or intrastate (See The IMC Proceedings, Post p. 29).

This rate to Sutton inaugurated on March 18, 1965, has a characteristic that is of vital importance in these proceedings. It is the only commodity rail rate for the movement of phosphate rock to the port of Tampa from the bone valley that was for the rail transportation and nothing else. The rates over the railroad owned facilities were what were known as "in-vessel" rates and uniformly included the putting of the phosphate rock into the hold of a vessel (A. 91). That in-vessel rate, at the commencement of these proceedings, was 115c a ton (A. 104). The Railroads consistently refused, in tariffs or otherwise to state separately the portion of the rate charged for the rail transportation and the portion charged for handling at the port and loading into vessel, and Commission upheld them in that refusal (A. 115).

The photograph to which reference has heretofore been made (R. 391) shows along its right hand edge the receiving and delivering tracks of the IMC facility at Sutton. All the railroad does under the rate to Sutton is to place loaded cars on those tracks and to take empty cars away from them. A plant locomotive handles the cars through the unloading sheds and puts them back for the pickup. A substantially identical facility to operate in the same manner would be constructed on the south finger of Port Sutton by The Phosphate Terminal Company (A. 47, an affiliate of Port Sutton, Inc.) and would be served by Tampa (A. 100), although Tampa would perform no service except the rail haul to Port Sutton where the cars would be taken over by The Phos-

phate Terminal Company, emptied, and returned to Tampa. At the time of the hearings, four years ago, Tampa expected to perform this rail service for 60c a ton (A. 103).

The railroad owned and operated facilities operate on an entirely different basis than the IMC Terminal or the proposed terminal of the Phosphate Terminal Company. The railroad facilities do not handle wet rock at all, and they provide no facilities for drying, blending or storage and serve no function independent of movement of the dry rock into the hold of a vessel. Such "blending" as is accomplished at the railroad facilities is done by the shifting of loaded cars, and the cars cannot be released until their contents have been dumped into the hold of a vessel (A. 62).

The IMC and the proposed Phosphate Terminal facility operate independently of the movement into the vessel, permit immediate release of the cars, and provide extensive facilities for drying, blending and storage of both wet rock and dry rock, functions with which neither Seaboard nor Tampa have anything to do.[6] IMC is the only producer that has a dryer at the port. All of the other dryers are situated at various locations in Hillsborough and Polk Counties, Florida, some distance from the port. (R. 387).

A few weeks after IMC had opened its new facility the Railroads announced that they were transferring their phosphate loading facilities from the port of Tampa to a point in Manatee County, called Piney Point, at which the Manatee County Port Authority proposed to

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[6] Wet rock contains approximately 13% water and, as such, is not sold to customers (R. 393-394).

build a new and modern phosphate loading facility, and on June 14, 1965, the Railroads filed a joint application with the Commission for authority to construct a new line of railroad of approximately 44 miles from the phosphate producing territory to Port Manatee (A. 45), to by-pass the port of Tampa (A. 67-68, 111), and to handle the phosphate rock at the same in-vessel rate of 115c (A. 104). That application was given Finance Docket No. 23688.

The consequences of the removal of the phosphate movement from the port of Tampa to Port Manatee were considered serious in the extreme by the Tampa and Port Sutton interests. In terms of tonnage handled Tampa was the largest port in the southeast between Norfolk, Virginia, and Mobile, Alabama with the phosphate rock constituting the great bulk of the tonnage (A. 70). Among other things, the removal of the phosphate tonnage from the port of Tampa would probably have made impossible the deepening of the channels to 42 feet without which the port of Tampa could not survive as a major port, but which work has now been approved by the Corps of Engineers (Supra, Note 5).

In the sheer effort at preservation of Tampa as a port, and of the investment in and at Port Sutton, which already amounted to over $100 million dollars (A. 100), the Tampa Phosphate Railroad Company was organized, Port Sutton, Inc. acquiring all of its stock for which it paid $1 million dollars (A. 95), and following the Railroads' application by only two weeks, on July 1, 1965, Tampa filed its application with the Commission for authority to build its 30 mile track (A. 45) to permit

substantial quantities of phosphate from other producers to continue to move to the port of Tampa, and to provide the industry with a means of protecting its transportation costs. That application was given Finance Docket 23718.

The protection of industry transportation costs would come about not only by reduced charges paid to Tampa but by the existence of competition. Due to the captive nature of much of the rock (A. 64, 86) and the inaccessibility of certain of the shippers (A. 98) Tampa could physically handle only a limited tonnage of the rock moving to the port and none whatsoever of the movement to the interior which produced 75% of the Railroads' phosphate rock revenue so that Tampa's inroads in the Railroads' gross revenues would not be significant (A. 57). Nevertheless, the mere existence of the competition would be a protection to the industry and, for that matter, to the Railroads themselves which stand to suffer directly from the foreign competition.

Tampa contended before the Commission, in its application and otherwise, that it would not be a carrier subject to Part I of the Act, that it would not engage in interstate commerce and, in any event that its proposed track would be exempt from the construction jurisdiction of the Commission under §1(22) even if the movement over it was interstate commerce, and it prayed in its application and by subsequent formal motion filed November 1, 1965 (A. 51) that its application should be dismissed on those grounds. The formal motion for dismissal on jurisdictional grounds (A. 121) was not finally

denied until the Commission's order of August 7, 1967 (A. 147).[7]

The examiner found that the situation was fraught with great general public interest, including the legitimate interests of Port Sutton, and not merely that of the railroad public interest, saying (A. 123):

> "Nevertheless, it is quite clear that there is more at stake here than the mere construction of a given number of miles of track, and that these proceedings are of great moment not only to the carriers involved, but to the Port of Tampa and the legitimate aspirations of Port Sutton and the people of Manatee County, and to the phosphate industry of Florida as well."

but in passing upon the initial question as to the jurisdiction of the Commission in respect of Tampa's application (the Railroads being obviously subject to Part I of the Act) he put to one side any question of the general public interest, and limited his concern to the railroad public interest concept, saying that (A. 121):

> "* * * in each case such determination must be made on the basis of the facts presented in the light of the Congressional policy * * *"

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[7] The examiner's comment that the motion was denied by the Commission on November 22, 1965, is not technically correct. The Commission's order said the issue could "best be resolved after hearing" (A. 51) which was simply a postponement of decision. If the Commission had at that time decided the question of its jurisdiction Tampa would probably have dismissed its application and proceeded then to mature the condemnation proceedings which would have made it crystal clear that Tampa was not attacking an order denying it a certificate for interstate operation.

The "congressional policy" to which the examiner had reference is, of course, the National Transportation Policy of the Act, which the concurring opinion of Chief Judge Brown sets out in full in footnote 11 (A. 36).

Having thus found the jurisdiction of the Commission over Tampa's application to be based upon the railroad public interest, the examiner likewise put aside any questions of general public interest in deciding the applications on the merits, saying (A. 124):

> "This is not to say, however, that the Commission should attempt to resolve the multifarious side-issues developed, or that these issues can be resolved within the narrow confines fixed by the scope of these proceedings. * * * This inquiry necessarily begins and ends with the question of public convenience and necessity solely as it relates to the proposed Piney Point and Tam-Phos lines."

and the examiner found that the industry sorely needed new facilities but that the railroad public interest did not justify the construction of the proposed line by either Tampa or the Seaboard.[8]

The Commission, by Division 3, had set for oral argument on February 8, 1967, the exceptions of both parties to the examiner's report (A. 147), and its subsequent action would indicate that it was concerned whether, if it granted the Port Manatee certificate to

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[8] The examiner found (A. 125):

> "If there is one thing on which all of the parties to these proceedings appear to be in wholehearted agreement, it is that the existing port facilities are grossly inadequate to handle expeditiously the present volume of port rock and that this volume is steadily increasing. There is no question but that if the Florida producers are to maintain their competitive position in the world market this bottleneck must be eliminated."

Tampa's proposed track and the manner of its operation made it nothing more than an adjunct of a vitally needed new facility.

the Railroads, the resulting enormous reduction in service to Tampa did not require, even in the railroad public interest, the grant of a certificate to Tampa for its proposed operation. When the Supreme Court of Florida invalidated the Manatee $18.5 million bond issue (A. 87) in its decision in *State of Florida v. Manatee County,* 193 So.2d 162 (December 14, 1966, rehearing denied January 23, 1967), however, the Commission cancelled oral argument and *dismissed* the Seaboard application, but *denied* the Tampa application (A. 147-150). Tampa thereupon abandoned its effort to secure interstate authority and proceeded with the condemnation actions until stopped by the Federal court injunction.

Subdivisions I. II and III of the opinion of the Court of Appeals are dealt with hereafter under the "Reasons Relied Upon for the Allowance of the Writ," but Subdivision IV of the opinion dealing with the effect of "changed circumstances" may appropriately be mentioned here. Tampa did not intend to argue to the Court of Appeals either orally or on brief that there would be any physical changes in the construction or operation of its proposed trackage, with the single exception that it might determine to restrict its operation to the handling of wet rock only.[9]

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[9] Tampa had devoted its utmost energies to satisfying the Commission that its facilities and operation were required as a matter of public necessity and convenience regardless of whether or not the Railroads' application in Finance Docket No. 23688 was granted, and its argument to the Court of Appeals was intended to be that the nature of the commerce was not merely a matter of law on the record made before the Commission but was a mixed question of fact and law and that there were additional relevant facts which it should be entitled to present to a court (*United States v. Idaho,* 298 U. S. 105, 80 L.Ed. 1070 (1936)).

Subdivision IV of the opinion indicates that, upon remand, but within a rather gray area, the Federal court, sitting as a one judge court in a § 1(20) action may pass upon the question of the nature of the commerce, provided there is (A. 33) "* * * new matter and new circumstances which justify treating Tampa's case as if there never had been an order of the Commission* * *" The opinion of the Court says that the burden of such a showing must be heavily upon Tampa (A. 33), and the concurring opinion says that the burden is impossible. (A 34-35).

Tampa agrees that the burden is impossible for even if Tampa restricts its operation to wet rock only the fact remains that the examiner's report considered and specifically held that the movement of wet rock was interstate (A. 117-117) which the Commission adopted (A. 147). But the burden is "impossible" for another reason.

The concession made by Subdivision IV of the opinion runs headlong into the dilemma mentioned above (Supra, p. 5 and 6). To whatever extent the one judge Federal district court might have jurisdiction notwithstanding the order of the Commission, the state court must have a like jurisdiction, so that upon the concession made by Subdivision IV § 1(20) would cease to be the express authority of an Act of Congress, and the injunction would become contrary to § 2283. Consequently, the burden is impossible if the injunction is to stand, and, as the concurring opinion observed (A. 40), "The return to the Trial Court will be a water haul for Tampa."

THE IMC PROCEEDINGS

The IMC was the only shipper that produced a witness to testify voluntarily before the Commission, where the two applications had been consolidated over Tampa's objections (A.48), in favor of Tampa's application but numerous shippers testified in support of the Railroads' application,[10] and the testimony offered for Tampa was that the operation of the facility on the south finger of Port Sutton would be substantially identical with the IMC operation (A. 100-101).

Due to the relevance of the IMC operation Tampa has called to the attention of the Court, by inclusion at the end of the Appendix (A. 171-194) certain recent developments involving the IMC operation at Port Sutton, and the railroad movement to Port Sutton, which have a bearing upon this case and upon the matters discussed in the opinion of the Court of Appeals.

On July 11, 1969, Seaboard petitioned the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act (5 U.S.C.A. 554(e)). The petition pointed out that the movement of the phosphate rock to IMC at Sutton, due to the *ex parte* increases on interstate traffic with no corresponding increases by the Florida Public Service Commission in the intrastate rate, was subject to one rate, the higher, if it was an interstate movement, and to a different and lower rate if it was an intrastate movement (A. 173).

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[10] The examiner noted the dependency of the shippers upon the Railroads for their supply of cars, even to keep their plants in operation (A. 84), and discounted their support of the Railroads' application (A. 125-126).

The petition for a declaratory order stated that Seaboard had been applying the higher interstate rate, that IMC contended the lower intrastate rate was applicable and had filed a claim for overcharges of approximately $800,000.00 (A. 173). It referred to the Commission's determination in the Piney Point and Tampa proceedings (Finance Dockets Nos. 23688 and 23718) that Tampa's proposed movement of phosphate rock to Port Sutton was interstate in character, and asked for a declaratory order that the actual IMC movement to Sutton was interstate in character and that the interstate rate should be applied (A. 175).

On August 5, 1969, IMC filed suit in the Circuit Court of Polk County alleging that the intrastate rate was applicable and praying judgment for overcharges aggregating $791,893.55, for the period from August 19, 1967, to May 9, 1969 (A. 175).

On August 18, 1969, Seaboard moved to dismiss that complaint in the state court on the grounds, among others, that it affirmatively appeared that the State Court lacked jurisdiction of the subject matter in that the exclusive or primary jurisdiction was in the Interstate Commerce Commission or the Florida Public Service Commission (A. 192-193).

On November 5, 1969, the Commission entered the following order (A. 194):

> "*And it is further ordered,* that, in the exercise of our discretion in this matter, in which the issue is now before the Court, the petition be, and it is hereby, denied."

In the order of the Florida Public Service Commission of May 14, 1969, that Commission also expressed the view that it should not consider a change in the rate

to Sutton (A. 182), "* * *until the parties have obtained some judicial determination concerning the nature of the transportation in question."

It is to be doubted if the state commission had in mind a three judge Federal district court. Compare the discussion in the opinion of the Court of Appeals as to "which court was to pass upon the question" (A. 22-23). In that discussion, however, the Court of Appeals was considering "which" court should review "the Commission's power to deny a certificate" but that was not the question. The review of the Commission's decision as to convenience and necessity is admittedly to be before a three judge Federal district court. The actual question before the Court of Appeals was not which court had had the power to review the question of convenience and necessity, but was which court, or courts, had power to adjudicate the character of the commerce.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

POINT I

THE OPINION OF THE COURT OF APPEALS CHANGED THE CHARACTER OF THE INJUNCTION AND TERMINATED THE LITIGATION.

The Court of Appeals referred to the rule that ordinarily the decree of a District Court granting or denying a preliminary injunction would not be disturbed on appeal, and found that Seaboard's complaint had raised serious questions that were "* * *a fair ground for litigation and thus for more deliberate investigation" (A.

9). That rule would, of course, militate against or preclude the grant of certiorari but it is not applicable here because the opinion and judgment of the Court of Appeals ousts the state courts of jurisdiction with finality and leaves no ground for more deliberate investigation.[11] In *Myers, post,* after noting that ordinarily the decree of a district court granting or denying a preliminary injunction would not be disturbed on appeal, this Court said (82 L.Ed. at p. 645):

> "But that rule of practice has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion."

The "insuperable" objection to the maintenance of this suit, in which the only relief prayed was the restraint of the state courts, was § 2283, and even if § 1(20) could be construed as the express authority of an Act of Congress permitting the injunction, the existence of a concurrent jurisdiction in the state courts made the injunction, in the absence of any showing of irreparable injury, the improvident exercise of judicial discretion, and, going further, if §§ 2321-2325, have in fact ousted the state courts of jurisdiction then the opinion of the Court of Appeals changed the injunction from interlocutory to a final disposition of the actions. And in the case of *American Construction Co. v. Jacksonville T. & K.*

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[11] The Court of Appeals cited the cases of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738 (CA 2nd, 1953), *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F. 2d 226 (CA 3rd, 1955) and *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 Ct. 459, 82 L.Ed. 638 (1938). The first two are irrelevant because on the question of the power to stay the state court proceedings the Court of Appeals leaves no question open for more deliberate investigation and the *Myers* case is authority for the exercise by this Court of its power of supervision.

W.R. Co. 148 U. S. 372, 13 S. C. 758, 37 L.Ed. 486 (1893), this Court pointed out that at what stage of the proceedings and under what circumstances the case should be required by certiorari or otherwise to be sent up for review was left to the discretion of this Court as the exigencies of each case may require.

In the instant case, the reason for the rule against interlocutory review has ceased to exist. Under the decision of the Court of Appeals, notwithstanding the guarded qualification of Subdivision IV of the opinion, this particular case is at an end, and there can be no further proceedings. If the restraint of the state courts by the District Court was in error, and if the reason for its affirmance by the Court of Appeals was in error, the remedy should be afforded now, and not wait a meaningless return to the trial court for the perfunctory entering of a permanent injunction against the state court proceedings and a subsequent appeal from that order. Nor is the finality of the decision of the Court of Appeals lessened by the possibility that the District Court may adopt the suggestion of the concurring opinion (A. 39. Note 13) and send the matter back to the Commission.

The validity or invalidity of the restraint of the state courts in the face of § 2283 is not dependent on how the Commission may rule on a re-examination of the questions. The decision of the Court of Appeals has forever ousted the state courts of their original jurisdiction for even if the Commission on re-examination should find the commerce to be intrastate, the Seaboard could not ask the state courts to hold otherwise for on the rationale of the Court of Appeals, the Commission's negative finding as to its jurisdiction could be reviewed only in a three judge Federal district court.

The opinion and judgment of the Court of Appeals changed the character of the injunction and terminated the litigation. The remand to the District Court became illusory, and the resulting situation calls for the exercise at this time of this Court's power of supervision.

POINT II

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

On its face § 1(20) gives to any court of competent jurisdiction the power to enjoin a violation of § 1(18). The statute does not state or even suggest that power to determine whether or not § 1(18) is being violated is taken away from the state courts. In the face of the plain language of the statute the decision of the Court of Appeals is in conflict with *Dowd Box Co. v. Courtney,* 368 U. S. 502, 82 S. Ct., 519, 7 L.Ed. 2d 483 (1962) and *Chaflin v. Houseman,* 93 U. S. 130, 23 L.Ed 833 (1876).

In *Dowd Box Co., supra,* the sole question presented was whether Section 301(a) of the Labor Management Relations Act of 1947 operated to divest a state court of jurisdiction over a suit for violation of a contract between an employer and a labor organization.[12] The Supreme Court agreed with the Supreme Judicial Court of Massachusetts (169 NE 2d 885) that the statute did not operate to deprive the state courts of jurisdiction.

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[12] 301(a) (29 U.S.C.A. § 185(a)) reads as follows:

"Suits for violaiton of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The Supreme Court cited with approval the case of *Chaflin v. Houseman,* supra, as expressing the law today even though decided eighty-six years ago, and held that the rationale of Lincoln Mills[13] would not be frustrated if state courts were allowed to exercise concurrent jurisdiction over suits within the purview of Section 301(a).

On the concurrent jurisdiction of the state courts to enforce rights created by Federal law, this Court said (7 L.Ed. 2d, at p. 487,488):

> "We start with the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule. * * *
>
> "To hold that § 301(a) operates to deprive the state courts of a substantial segment of their established jurisdiction over contract actions would thus be to disregard this consistent history of hospitable acceptance of concurrent jurisdiction."

The power of the Florida courts to decide whether a proposed railroad construction is in violation of § 1(18) or comes within the exception of § 1(22) is part of their established jurisdiction (*Seaboard Air Line Ry. Co. v. Tampa Southern R. Co.,* 121 So. 877 (Sup Ct. Fla. 1929)) and was so recognized by the Fifth Circuit in *Georgia Southern & Florida Ry. Co. v. Duval Connecting R. Co.,* 324 F.2d 801 (CA 5th 1963). The opinion of the Court of Appeals does not concede the existence

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[13] *Textile Workers Union v. Lincoln Mills,* 353 U. S. 448, 1 L.Ed. 2d 972 (1957).

here of a concurrent jurisdiction in that respect in the state and Federal courts,[14] and does not discuss it in that context, simply saying that (A. 16), "The case before us involves neither the same cause of action in both state and federal courts, nor a common *res* over which the district court had to assume jurisdiction.' In refusing to recognize and give effect to the concurrent jurisdiction of the state and Federal courts the Court of Appeals disregarded its own teachings[15] as well as the decisions of this Court.

POINT III

THE DECISION OF THE COURT OF APPEALS DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE BY THIS COURT OF ITS POWER OF SUPERVISION

The present §§ 2321-2325 had their origin in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 208) which abolished the Commerce Court and transferred its jurisdiction to the several District Courts of the United States (38 Stat. 219-221). That act, and the procedure it prescribed had been in effect for nearly seven years at the time of the enactment of the Transportation Act of 1920 on February 28, 1920 (41 Stat. 456) which enacted the present §§ 1(18), 1(20) and 1 (22) (41 Stat. 477-478.)

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[14] The only discussion of concurrent jurisdiction was an inquiry whether it existed as between the one judge Federal district court and the three judge Federal district court, which were found to be mutually exclusive (A. 22-23).

[15] In *T. Smith & Son, Inc. v. Williams*, 275 F.2d 397 (CA 5th, 1960), which received only a "cf." reference in this opinion (A. 11).

The Congress, in enacting § 1(20) obviously did so in the light of the Urgent Deficiencies Act. It does not seem reasonable to believe that by the use of the words "any court" in § 1(20) Congress intended not only something different than the plain meaning of the words, but also that it actually intended in 1920 by the qualifying words "of competent jurisdiction," to oust the state courts of their judicial power by depriving them of their status as courts of competent jurisdiction.

Research by counsel for Tampa has not disclosed another case in which § 1(20) and §§ 2321-2325 have been bracketed in this manner to produce such a result and it is respectfully submitted that the resulting construction put upon § 1(20) nearly fifty years after its enactment falls within the ban so forcefully expressed in *Romero v. International Term. Operat. Co.*, 358 U. S. 354, 79 S. Ct. 468, 3 L.Ed 2d 368 (1959) and calls for the exercise by this Court of its power of supervision.

POINT IV

§ 1(20) AND §§ 2321-2325 AS NOW CONSTRUED, BY DENYING TO TAMPA ANY JUDICIAL DETERMINATION OF THE JURISDICITION OF THE COMMISSION DENY TAMPA DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This point may, perhaps, be also stated by pointing out that the Court of Appeals denied Tampa constitutional due process by holding that the matter of the Commission's jurisdiction was committed to its own expertise and could be challenged only in a three judge court (A. 25), in the face of settled construction to the contrary (*Texas & Pacific*, post, note 16).

At the time of Tampa's application to the Commission and, in fact, up until the instant decision of the Court of Appeals the law had been settled for over forty years than an unsuccessful applicant for a certificate, by making application to the Commission, coupled with a suggestion to the jurisdiction, did not waive any right later to defend a § 1(20) action on the ground of lack of jurisdiction in the Commission[16] and to have the issue tried *de novo*[17].

The discussion in the opinion of the Court of Appeals of the repudiation of the negative order doctrine by *Rochester*[18] does not appear to be relevant. *Rochester* simply holds that Tampa could, if it so desired, have had a *review* of the Commission decision *denying it a certificate* before a three judge Federal district court, but it does not hold either that Tampa is compelled to convene a three judge Federal district court, or that the repudiation of the negative order doctrine in any way impaired, the jurisdiction of any court of competent jurisdiction, state or Federal, previously existing.[19]

The contention presented under this point is different from that presented under Point V in that while the Federal district court, if composed of three judges,

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[16] *Texas & Pacific R. Co. v. Gulf C. & S.F.R.Co.* 270 U. S. 266, 70 L.Ed. 578 (1926) and *Piedmont & Northern Co. v. Unted States,* 280 U. S. 469, 74 L.Ed. 551 (1930)

[17] *United States v. Idaho,* 298 U. S. 105, 80 L.Ed. 1070 (1936)

[18] *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 59 S. Ct. 754, 83 L.Ed. 1147 (1939)

[19] *Rochester Telephone Corp. v. United States,* 307 U. S. 125, 83 L.Ed. 1147 (1939), "The nature of the issues foreclosed by the Commission's action and *the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same.*" (307 U. S. at p. 142) (Emphasis supplied)

has power to *review* Commission action it has no power to *adjudicate* in respect of a matter not heretofore committed by law to the expertise of the Commission.

This present construction of § 1(20) and §§ 2321-2325 by the Court of Appeals denies Tampa due process of law (*Gelpecke v. City of Dubuque*), 1 Wall 175, 17 L. Ed. 520 (1864), *Dawson v. Kentucky Distilleries & Warehouse Co.* 255 U. S. 288, 41 S. C. 638, 65 L.Ed. 638 (1921), and *Montana Nat. Bank v. Yellowstone County,* 276 U. S. 499, 48 S. Ct. 331, 72 L.Ed. 673 (1928)).

POINT V

THE CONSTRUCTION OF § 1(20) AND §§ 2321-2325 AS OUSTING THE STATE COURTS OF THEIR OWN JURISDICTION IN EMINENT DOMAIN PROCEEDINGS INVADES THE RESERVED POWERS OF THE STATES IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

This point is directed to the effect upon the state courts, rather than the effect upon Tampa. In *Douglas v. Jeanette,* 319 U. S. 157, 63 S. Ct. 877, 87 L.Ed. 1324, at 87 L.Ed. 1324, this Court said:

> "The power reserved to the states under the constitution to provide for the determination of controversies in their courts may be restricted by Federal district courts only in obedience to Congressional legislation in conformity to the Judiciary Article of the Constitution."

And in *Healy v. Ratta,* 292 U. S. 263, 54 St. Ct. 700, 78 L.Ed. 1248, at 78 L.Ed. p. 1254, this Court said:

"Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."

This present construction of § 1(20) and §§ 2321-2325 makes those statutes Congressional legislation that is not in conformity with the Judiciary Article of the Constitution.

POINT VI

THE OPINION OF THE COURT OF APPEALS PRESENTS SERIOUS QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The questions raised by the opinion of the Court of Appeals are of public interest and moment in the administration of the Act and in the interrelationship of Federal and state authority.

On April 24, 1969, the Commission submitted to the Congress proposed legislation that would repeal §§ 2321-2325 of the Judicial Code and transfer to the United States Courts of Appeal exclusive jurisdiction to review orders of the Commission. It would limit review to the record made before the Commission and would require that a petition for review be filed within 60 days. It does ont mention § 1(20) but would provide in its § 2 that, "Chapter 157 of Title 28, United States Code *and any other provision of law inconsistent* with this Act are hereby repealed." (Emphasis supplied (Commission release No. 112-69, April 24, 1969).

This Court noted *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U. S. 576, 86 S. Ct. 1000, 16 L.Ed. 2d 109 (1966), that Congressional attention to the entire subject matter of review of Commission orders was long overdue and the questions presented by this opinion of the Court of Appeals are relevant and material to that subject matter and have not been, but should be, settled by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Dated at Tampa, Florida,
Nov. 22, 1969

s/ JAMES B. MCDONOUGH, JR.

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that on this 22nd day of November, 1969, one copy of the foregoing Petition for Writ of Certiorari was furnished by delivery to William A. Gillen, Esq., and one copy also by delivery to James E. Thompson, Esq., both of Messrs. Fowler, White Collins, Gillen, Humkey and Trenam, First Federal Building, Tampa, Florida, attorneys for respondent Seaboard Coast Line Railroad Company, and that one copy of the same was furnished by air mail with postage prepaid to the Solicitor General, Department of Justice, Washington, D. C., and in like manner one copy was furnished to John H. D. Wigger, Esq., Department of Justice, Washington, D. C., and in like manner one copy each to Robert W. Ginnane, Esq., and Jerome Nelson, Esq., Counsel for the Interstate Commerce Commission, Washington, D. C., and that copy has also been furnished by air mail with postage prepaid to the Clerk of the United States Court of Appeals for the Fifth Circuit, 400 Royal Street, New Orleans, Louisiana.

s/JAMES B. MCDONOUGH, JR.

Counsel for Petitioner